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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re D.H., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.H.,

Defendant and Appellants.

A133465

(Alameda County Super. Ct.
No. SJ11017499-01

In a petition proceeding held pursuant to Welfare and Institutions Code section 602,¹ the juvenile court found that D.H., a female minor, committed a felony assault. D.H. nonetheless seeks remand for the juvenile court to expressly declare whether the offense was a felony or a misdemeanor pursuant to section 702. We conclude the court has already made this declaration. Therefore, the judgment is affirmed.

BACKGROUND

In August 2011, the Alameda County District Attorney filed a section 602 petition alleging four counts of misconduct against minor, then 13 years old, relating to an incident that occurred earlier that month. Counts one and two alleged minor committed attempted robbery in violation of Penal Code sections 664 and 211, with personal use of a “BB gun” regarding both in violation of Penal Code section 12022, subdivision (b).

¹ All statutory references herein are to the Welfare and Institutions Code unless otherwise indicated.

Counts three and four alleged minor also committed felony assault with a deadly weapon, the BB gun, by means of force likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1).

An incident report from the Hayward Police Department and witness statements were attached to the petition. They contain allegations that on August 17, 2011, about 10:45 p.m., six or seven female minors, including minor, were standing in the middle of the street when a man stopped his car by them to avoid hitting them. The girls surrounded the car and, after the man declined to give them a ride, jumped on top of it. The man slowly drove home with the girls on top of the car, where he honked his horn to alert his family members. A gun that looked like a semi-automatic weapon was taken out of a red bag, and minor pointed it at the head of the man's uncle and asked him for money. After the uncle asked them what they were doing, the girls walked away, possibly because they saw his wife inside the house calling the police.

It was further alleged that the police were called. The car driver, his uncle, and his aunt drove around looking for the girls and spotted some of them getting on an AC Transit bus on Hesperian Boulevard. The police stopped the bus, detained four girls, including minor, and found a red bag in the rear of the bus containing a plastic black semi-automatic handgun. The girls were positively identified in an in-field lineup, and the gun identified as the weapon pointed at the uncle's head. The four girls were arrested.

At the jurisdictional hearing, the court asked minor's counsel if minor was going to settle her case. Minor's counsel responded, "The prosecution has offered a plea to count three, as a felony, and we're prepared to accept that today." The court then advised minor of her rights, which she acknowledged she understood, and told minor that if she admitted count three, "the most time that [she] could be locked up is four years" and could be fined up to \$1,000. Upon being questioned by the court, minor indicated she wanted to give up her rights and admit she committed the assault, and knew her conduct was wrong when she committed it. Defense counsel stipulated a police report provided a factual basis for the allegation. The court then stated: "She has made a knowing and

voluntary waiver of her rights and understands the nature and consequences of doing so. [¶] She is described by [Penal Code section] 26 and also by [Welfare and Institutions Code section] 602 in that she committed a violation of 245, subdivision (a)(1), a felony, as charged in count three. And just for the record, that's by means of force likely to produce great bodily injury. [¶] And counts one and two and count four are dismissed with facts in restitution opened as are the use clauses. [¶] And it will go over for disposition, and that will be on the 27th."

At the subsequent disposition hearing, the court found that minor was a ward of the court, and ordered her to reside with her mother. The court further ordered that minor be placed on electronic monitoring for 120 days and perform 100 hours of community service. Minor filed a timely notice of appeal.

DISCUSSION

Minor argues that, pursuant to section 702, the juvenile court was required to declare whether the assault allegation it found to be true, a "wobbler,"² involved misdemeanor or felony assault, but did not, and that the record does not indicate the court was aware of its discretion to make this determination. Therefore, she asserts, we must remand the matter for the juvenile court for the required declaration. We agree with the People that the court's statements at the jurisdictional hearing satisfied its obligation under section 702.

Section 702 provides in relevant part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony."

The requirements of this provision are addressed in *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy*). The minor in *Manzy* admitted to an allegation of possession of methamphetamine, which was a wobbler. The allegation was charged as a felony and the minor admitted to that allegation at the jurisdiction hearing. However, the court never referred to its discretion to declare the offense as a misdemeanor. Our Supreme Court

² "A wobbler is any crime that may be punished as either a misdemeanor or a felony." (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1443, fn. 3.)

held that the failure to make the mandatory express declaration required under Welfare and Institutions Code must result in remand as strict compliance is required by section 702. (*Manzy, supra*, at p. 1204.)

The *Manzy* court explained that one of the reasons for requiring strict compliance with section 702 is to ensure “that the juvenile court is aware of, and actually exercises, its discretion under . . . section 702.” (*Manzy, supra*, 14 Cal.4th at p. 1207.) The court explained that “neither the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony.” (*Id.* at p. 1208.)

The *Manzy* court also explained the circumstances when remand is not necessary: “[T]he record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error. We reiterate, however, that setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated. The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit.” (*Manzy, supra*, 14 Cal.4th at p. 1209.)

Minor contends in relevant part that “nothing in the record in the case at bar demonstrates that the juvenile court was aware of its sentencing discretion. The juvenile court never expressly stated on the record whether the Penal Code section 245, subdivision (a)(1) violation was a misdemeanor or a felony. . . . At the time of [minor’s] admission, the court summarily found that [minor] had committed the violations as alleged in count three of the petition which was charged as a felony.”

The People argue that minor’s contentions are unsupported by the record, which indicates that the juvenile court declared minor had committed an offense that was a felony, as required by section 702. We agree. After the parties stipulated to the police report as a factual basis for the allegation, the court explicitly declared that minor

“committed a violation of 245, [subdivision] (a)(1), a *felony*, as charged in count three. And just for the record that’s by means of force likely to produce great bodily injury.” (Italics added.) The court’s statement was stated as a finding, not merely as a recitation of the charges contained in count three. Its finding included the declaration that minor had committed a felony. Section 702 does not require that the court make any further statement.

The juvenile court’s statement that minor “committed” a “felony” distinguishes this case from those relied on by minor, none of which involved an express statement by a court about the status of the offense involved. (*Manzy, supra*, 14 Cal.4th at pp. 1202-1203; 1207 [the People argued the court had made an “ ‘implied’ declaration”]; *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [court, although it imposed a felony-level maximum confinement period, did not declare the offense to be a felony or a misdemeanor]; *In re Kenneth H.* (1983) 33 Cal.3d 616, 620 [“the crucial fact is that the court did not state at any of the hearings that it found the [offense] to be a felony”].)

Although it is not necessary, we also note that the context in which the juvenile court made its declaration at the hearing indicates it was aware of its discretion to consider the offense as a felony or misdemeanor. Minor’s counsel began discussing the parties’ negotiated disposition of the case by stating to the court, “The prosecution has offered a plea to count three, *as a felony*, and we’re prepared to accept that today.” (Italics added.) Minor’s counsel’s statement does not make sense except as a reference to the possibility minor could be found to have committed a misdemeanor rather than a felony. The court’s immediate turn into a discussion with the minor regarding the possible sentence she could receive (which, as stated by the court, was consistent with a felony), the rights she was giving up, and the nature of her admission indicates the court’s ready acceptance of the parties’ negotiated disposition, which included minor’s admission that she committed a felony. The court then concluded with its declaration that minor had “committed” a violation of the relevant statute, a “felony.”

Also, the juvenile court later indicated its view that minor’s misconduct was of a serious nature, further demonstrating the court independently considered the matter.

Specifically, two weeks after the jurisdictional hearing, the court on its own motion continued the disposition hearing when it learned minor’s counsel had to leave because “this is a pretty serious case, and I think she should be here.”

In their reply brief, the People note that the juvenile court arguably did not comply with certain Rules of Court that require in relevant circumstances that the court, if any offense may be found to be either a felony or misdemeanor, “consider which description applies and expressly declare on the record that it has made such consideration,” and “state its determination as to whether the offense is a misdemeanor or a felony.” (Cal. Rules of Court, rules 5.780(e)(5), 5.778(f)(9).) The People argue that any such error was at most harmless because minor has not shown it is reasonably probable she will obtain a more favorable result on remand. Minor does not raise this issue in her appeal. Therefore, we do not consider it further.

We also do not address the additional arguments between the parties in light of our conclusion that the court’s declaration at the jurisdictional hearing complied with section 702.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.